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My name is John Martin, and I am an attorney who has worked in the field of environmental litigation for more than 25 years. Over the years, I have represented clients on many matters involving the National Environmental Policy Act (NEPA), and have published and taught on NEPA issues. I currently represent a number of companies whose ability to undertake energy projects has been delayed or thwarted by the application of NEPA. I would like to take this opportunity to share my thoughts on NEPA, and how revisions to the legislation could decrease uncertainty associated with the NEPA process, while preserving the statute's capacity to inform decision-makers of environmental issues before permanent commitments of resources are made. While many of my comments reflect concerns raised by my clients in energy-related fields, the issues raised here are equally relevant to NEPA's application in other contexts.

NEPA was intended to further the laudable goal that agencies take into consideration the anticipated environmental impacts of their actions before making decisions. In addition, the public was to be given the opportunity to provide their comments on the environmental impacts associated with particular projects. Our clients support these policies: we believe government decision-makers should be informed of environmental impacts associated with their choices and that the public should be informed of, and permitted to comment on, those impacts as well.

Unfortunately, over the years, ambiguities and gaps in the initial NEPA statute, inconsistencies in case law, and incomplete and confusing agency regulations have produced the unintended consequences that now overshadow NEPA's original goals. For many, NEPA has come to mean years of delay and uncertainty as well as the imposition of huge costs on the government and private parties to no effective end. Rather than focusing on efforts tailored to best address realistic environmental concerns, government agencies are spending vast amounts of time and money to attempt to anticipate and respond in advance to every conceivable litigation attack a potential plaintiff might make. In many instances, public funds that should be going toward fulfilling substantive agency mandates are instead going toward bulletproofing EISs and defending lawsuits. Instead of processing permits, agencies work on litigation strategies. Instead of taking actions that protect the environment, agencies engage in "paralysis through analysis."

Once litigation sets in, projects can become mired in such lengthy disputes that they are no longer viable. Even before that happens, the huge uncertainties surrounding the Government's response, the vagaries of litigation and the timing of a final answer, mean that it may simply be infeasible to direct resources to a project where NEPA is involved. All of this creates an artificial and inefficient allocation of resources, with large amounts of time and money going to litigation expenses and to the study of the potential environmental impacts of paths that will never be taken.

In addition, of course, the uncertainty and the inordinate delays created by NEPA lawsuits often subject project proponents as well as federal, state and local governments to vast financial losses. For example, the threat and reality of NEPA litigation has repeatedly given rise to needless delays – often for several years – in development of the nation's critical energy resources, including oil and gas. Courts may enjoin project activities pending resolution of a lawsuit, which can take

years. Even if they do not, the uncertainty arising from the litigation may make it impossible to commit necessary investments and the window of opportunity for the project may be lost.

These procedural impediments directly hurt not only the companies that would develop the resources at issue but the public at large. Delays and uncertainty mean lost jobs. In addition, federal, state and local governments count on the income from royalties and production taxes to fund their schools, roads and other needed infrastructure. Moreover, in some cases, NEPA litigation gives rise to a cruel irony: NEPA can cause, rather than cure, environmental harm.

For all these reasons, substantial changes to NEPA are long overdue. My suggested legislative amendments fall into the following four over-arching categories:

- ***Clarify and revise the scope of agencies' NEPA obligations***;
- ***Impose requirements on NEPA plaintiffs to discourage frivolous lawsuits***;
- ***Permit increased participation in litigation by project proponents and other interested parties;***
- ***Provide courts with more guidance***;

Specific suggestions in each of these areas are presented below.

I. CLARIFY AND REVISE THE SCOPE OF AGENCIES' NEPA OBLIGATIONS.

A. Clarify the Alternatives an Agency Must Analyze.

NEPA requires an Environmental Impact Statement ("EIS") to consider "alternatives to the proposed action."[1] The statute itself, however, provides little guidance on how an agency must fulfill this "alternatives" analysis. The 1978 regulations promulgated by the Council on Environmental Quality ("CEQ") emphasize the importance of the alternatives analysis to an EIS, denoting it "the heart of an [EIS]."[2] The CEQ regulations require agencies to "include reasonable alternatives not within the jurisdiction of the lead agency" as well as the "no action" alternative.[3] These regulations also require the agency to describe the "underlying purpose and need" that the alternatives and proposed action must meet.[4] Beyond these very general directives, however, the CEQ regulations provide minimal instruction as to how this analysis must proceed.

[1] 42 U.S.C. § 4332(C)(iii).

[2] 40 C.F.R. § 1502.14.

[3] 40 C.F.R. § 1502.14(c), (d).

[4] 40 C.F.R. § 1502.13.

Unfortunately, the case law that has developed over the years does not resolve this uncertainty. The jurisprudence regarding the duty of agencies to consider alternatives is dominated by two court opinions whose interpretations sometimes lead to inconsistent results. The first case, *Natural Resources Defense Council, Inc. v. Morton,* 458 F.2d 827 (D.C. Cir. 1972), adopted a "rule of reason" and took a broad view of the range of alternatives that should be discussed. In that case, alternatives outside an agency's scope of statutory authority that require legislation or administrative action were still considered viable alternatives. Moreover, even an alternative that was a partial solution to the issue was to be considered. Nevertheless, "remote" or "speculative" alternatives did not need to be discussed.

In 1978, the Supreme Court addressed NEPA alternatives analysis in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519 (1978). There the Court affirmed application of the "rule of reason" but seemed to eliminate from consideration most alternatives that had not yet been studied. *Vermont Yankee* directed that an agency need not consider an infinite range of alternatives, but it must consider a range of alternatives that are reasonable and feasible.

Lower courts interpreting these cases and subsequent precedent have reached a range of conclusions about the breadth of alternatives that need to be considered.[5] Given the confusion over how far agencies must go in examining alternatives that have no realistic likelihood of being selected, some legislative constraints should be placed on what alternatives an agency must consider. For example, amendments to NEPA should make clear that when the proponent of a project would never employ a particular technology or construct a project on a particular location, the "alternative" should not be evaluated in detail. Similarly, legislation should confirm that when an alternative would not fulfill the purpose of and need for the project, as articulated by the agency, it need not be considered in detail. Rather, agencies should be vested with express statutory authority to decline to consider alternatives that they consider not "reasonable" or "realistic." Finally, where an alternative would be outside the jurisdiction of the agency, that agency should not be required to evaluate that alternative.

B. Provide for Short Form EISs.

In many instances, agency decision-makers receive little benefit from a very detailed analysis of the environmental impacts associated with a project that, for example, has been analyzed in detail before but arguably requires a "supplemental" EIS in light of some new information or occurrence, or is an activity with limited or very predictable impacts, such as an activity that is repeated over and over again in essentially the same fashion. In cases of this sort, the agency should have express

[5] *Compare Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (narrowly construing the alternatives requirement and holding that "[a]n agency cannot redefine its goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process) *with Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) (broadly construing the alternatives analysis and finding: "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals.").

authority to (i) shorten comment periods, (ii) avoid any repetition of pre-existing analyses, (iii) limit the text that the agency otherwise would prepare, and (iv) respond, in a summary fashion, to comments on the EIS.

C. Impose Timelines and Cost Caps on NEPA Documentation.

In March 1981, the CEQ published the Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations.[6] In response to the question of how long the NEPA process should take to complete, the CEQ responded that "under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process" but that program EISs may require a greater period of time.[7] CEQ also noted that when only an EA is necessary, "the NEPA process should take no more than 3 months, and in many cases substantially less, as part of the normal analysis and approval process for the action."[8]

Today, contrary to CEQ's anticipated timelines, EISs can take years to complete and cost millions. Similarly, Environmental Assessments (EAs) have begun to look more like EISs, costing more and taking more time. Congress should consider granting agencies specific authority to set timelines and spending limits for specific NEPA documents and link them to the level of decision being made (*e.g.*, mandate a six-month deadline for particular categories of EISs). Likewise, Congress should make clear that agencies have wide latitude in how they document their NEPA findings and should consider approving short-form or "checklist" formats for particular types of NEPA analyses.

D. Make Use of Adaptive Management Techniques.

Currently, CEQ regulations arguably require agencies to identify and fill in information gaps when there is incomplete information relevant to reasonably foreseeable significant adverse impacts and the overall cost of obtaining the information is not exorbitant.[9] This requirement to fill in information gaps is often quite expensive and time consuming. Agencies instead should be expressly permitted the prerogative to develop NEPA documentation based on current information, and to use rigorous adaptive management techniques (i) to adopt more targeted mitigation measures as needed, (ii) to recommend Best Management Practices, and (iii) to generate a Supplemental EIS when there is significant new information on environmental issues that bear on the action.

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[6] *See* 46 Fed. Reg. 18026 (March 16, 1981).

[7] *Id.* (question 35).

[8] *Id.*

[9] 40 C.F.R. § 1502.22.

E. Expand the Use of Categorical Exclusions.

Categorical exclusions provide for expedited review when a proposed action is of a type that is likely to impose little or no environmental impact. These projects do not escape review. Instead, a categorical exclusion requires agencies to confirm that the impacts associated with a proposed action are indeed extremely limited. We support prior comments that have requested broader authorization to employ categorical exclusions from the statute. Examples of appropriate additional categorical exclusions include:

- existing projects that simply require a renewal permit (suggested by Steve Smith of Texas Mining & Reclamation Association at the July 27, 2005 hearing);

- activities that are non-significant or temporary (suggested by Steve Smith of Texas Mining & Reclamation Association at the July 27, 2005 hearing);

- completed or proposed mitigation actions that are sufficient to avoid significant impacts (suggested by Steve Smith of Texas Mining & Reclamation Association at the July 27, 2005 hearing); and

- approval of on-lease linear facilities when they are placed in existing corridors or areas of prior disturbance (suggested by Dave Brown of BP America at the August 1, 2005 hearing).

Agencies should have the flexibility to utilize categorical exclusions in these and other appropriate situations: an agency's expertise should be applied to discern situations where full-fledged analysis would only repeat work already done on comparable projects or where a project is unlikely to give rise to significant impacts. In these situations, categorical exclusions should be employed. Providing agencies with this flexibility will allow the United States to avoid unnecessary and duplicative agency efforts that do not benefit the environment and waste valuable resources.

F. Clarify that Agencies Need Not Examine Impacts That Are Not Reasonably Foreseeable.

Some interpretations of the existing NEPA regulatory scheme suggest that when conducting an EIS, an agency must predict all potential impacts of events, including, for example, terrorist attacks, where the nature, and even the likelihood, of those events is completely unforeseeable. NEPA should not require agencies to predict unpredictable events or quantify unquantifiable risks, especially where there is no causal nexus between the project and the event in question. Where courts are permitted to impose these fundamentally impossible tasks on agencies, NEPA becomes nothing more than a convenient veto for any project opponent willing to initiate a lawsuit. The statute should make clear that only reasonably foreseeable impacts, with a close causal relationship to the action in question, need be examined, and should set guidelines for what constitutes "reasonable foreseeability" in this context.

II. IMPOSE REQUIREMENTS TO DISCOURAGE FRIVOLOUS LAWSUITS.

A. Require Exhaustion of Administrative Remedies.

Exhaustion of remedies is a well-established principle in administrative law: a party must pursue available means of recourse within an agency before resorting to a judicial challenge of the agency's action. Under the related doctrine of "waiver," a party must raise a particular issue before the agency in order to be able to pursue a subsequent judicial challenge based on that issue.[10] Moreover, an objection to an agency position must be made with sufficient specificity reasonably to alert the agency to the potential flaws in its analysis.[11] These doctrines have multiple purposes: avoiding premature claims before agencies can develop appropriate background, allowing agencies to apply their own expertise, giving agencies the "first chance" to exercise their own discretion before judicial review, and providing agencies the opportunity to find and ameliorate their own errors.[12]

Where NEPA is concerned, however, current case law is not clear that parties must raise issues before the agency and must exhaust administrative remedies in order to pursue judicial review. Some case law suggests that a party need not raise a particular issue before the agency so long as some other party has raised that issue. Some courts apply a balancing test to determine whether exhaustion should apply, weighing the agency's interests in appropriate process against the harm to a plaintiff if judicial review is denied. In other cases, exhaustion is routinely required where an agency's regulations require administrative appeal before judicial review.[13] Finally, at least one court has held that because NEPA applies to all federal agencies, no agency has expertise in NEPA and exhaustion rule does not apply.[14] This lack of uniformity in the NEPA context not only adds to

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[10] *See, e.g.*, *Marathon Oil Co. v. United States*, 807 F.2d 759, 767-68 (9th Cir. 1986); *Tex Tin Corp. v. U.S. E.P.A.*, (D.C. Cir. 1991)("[a]bsent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue.")

[11] *See Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1519 (D.C.Cir.1988), cert. denied, 489 U.S. 1078 (1989).

[12] *See, e.g., McKart v. United States,* 395 U.S. 185, 194-95 (1969)(addressing exhaustion) *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952) (addressing waiver and explaining that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.")

[13] *See Trout Unlimited v. Dep't of Agriculture,* 320 F. Supp. 2d 1090, 1098 (D. Colo. 2004).

[14] *See Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987).

litigation uncertainty after agency decisions are made, but also forces agencies to try to anticipate objections from a potential plaintiff, even where those objections were never raised before the agency. [15]

To address this confusion and give agencies an opportunity to respond to potential criticisms, the doctrines of exhaustion and waiver should be codified in NEPA. NEPA should be amended to explicitly require the timely participation of third parties in proceedings before the agency. The statute should make clear that parties are required to put agencies on notice of potential flaws in their NEPA analyses by providing sufficiently detailed comments during the public process. For example, parties seeking to challenge an agency's alternatives analysis should be required to alert the agency to overlooked alternatives well before the Final EIS and Record of Decision (ROD) are entered.[16] Similarly, parties should not be allowed to claim that NEPA documents inadequately considered the environmental or other effects of the proposed action when they failed to raise those issues during the public comment process or declined to pursue all available opportunities for administrative challenges.[17] Third parties should be prohibited from bringing actions based upon matters that they neglected to discuss thoroughly before the agency during administrative proceedings or that they failed to pursue through all available administrative procedures.

B. Strengthen Bond Requirements for Plaintiffs Seeking Injunctions.

Federal Rule of Civil Procedure 65(c), which covers preliminary injunctions, provides:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such ***costs and damages*** as may

[15] The Supreme Court has recently reconfirmed that parties challenging an agency's NEPA compliance bear a responsibility to "structure their participation so that it is meaningful, so that it alerts the agency to the [parties'] position and contentions." *Dep't of Transportation v. Public Citizen,* 124 S. Ct. 2204, 2213 (2004). *See also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1208 (9th Cir. 2004) (similar). *'Ilio'Ulaokalani Coalition v. Rumsfeld*, 369 F. Supp. 2d 1246, 1253 (D. Hawai'i 2005). The Court indicated that this is true even though the agency has the primary responsibility to ensure NEPA compliance, but the Court went on to note that flaws in the NEPA process "might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Public Citizen,* 124 S. Ct. at 2214.

[16] *Public Citizen,* 124 S. Ct. at 2214 (finding respondents "forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action").

[17] *See, e.g., Havasupai Tribe v. Robertson,* 943 F.2d 32, 34 (9th Cir. 1991).

> be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.[18]

Federal Rule of Civil Procedure 62(c), which covers injunctions pending appeal, requires a bond to be in an amount "proper for the security of the rights of the adverse party." Fed. R. Civ. P. 62(c). The posting of either type of injunction bonds allows the court to preserve the status quo, but at the same time protects defendants against damage they might suffer if the court later finds a permanent injunction is not warranted.

Despite these two rules, a number of cases suggest that some plaintiffs occupy a privileged position and are only required to post a nominal bond if they obtain an injunction that halts a project.[19] This "NEPA exception" to the bond requirement is meant to allow private organizations to pursue NEPA enforcement. In most cases, plaintiffs are not required to post a bond at all, or only a small nominal bond, irrespective of their potential financial resources.[20] Thus, over the years, the concept of protecting the "public interest" has become conflated with the goal of stifling agency action.

The injunctions granted by courts routinely cost industry and the government huge sums while a project is delayed and additional environmental analyses are conducted in order to correct a deficiency in an EIS. When the injunction is wrongly issued and no bond has been posted, industry participants have no recourse in recovering their substantial losses and the government has no recourse for the resources it has inappropriately allocated to additional NEPA analyses. Amendments to NEPA should explicitly disclaim the "NEPA exception" to the Federal Rules' clear requirements that plaintiffs post bonds to cover the "costs and damages" and to "secure[] the rights of the adverse party." Courts should be required to conduct an appropriate balancing test that considers not just the desire to have private parties enforce NEPA, but also protect the rights of the government and project proponents and defray the costs from lawsuits which result in serious delay and huge price tags.

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[18] Fed. R. Civ. P. 65(c) (emphasis added).

[19] *See, e.g., Save Our Sonoran v. Flowers*, 381 F.3d 905, 916 (9th Cir. 2004) (noting Ninth Circuit's "long-standing precedent that requiring nominal bonds is perfectly proper in public interest litigation"); *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) ("where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered").

[20] A few courts have adopted a "balancing" test, considering the relative hardship to the parties. *See, e.g., Save Our Sonoran v. Flowers*, 381 F.3d at 916 (requiring $50,000 bond and noting such an amount was appropriate "[s]o long as a district court does not set such a high bond that it serves to thwart citizen actions").

C. Impose a 180-Day Statute of Limitations on NEPA Claims.

Neither NEPA, nor the Administrative Procedure Act ("APA"), which provides a private right of action under NEPA, have an explicit statute of limitations. While the issue is not completely settled, most Circuit Courts of Appeal hold that the appropriate statute of limitation for bringing a NEPA action is six years. The view is grounded on the language of 28 US.C. § 2401(a), which is the general statute of limitations for claims against the United States and which has been routinely applied to Administrative Procedure Act lawsuits.[21] Some case law and commentators suggest, however, that statutes of limitations do not apply to NEPA claims.[22]

Courts applying the six-year period consider a final EIS or Record of Decision based on that EIS to constitute "final agency action."[23] In most instances, projects subject to NEPA will engender significant investment (e.g., planning, permitting, preliminary construction activities) and may be substantially underway even a few months after an EIS or ROD has been approved. Obviously, the more time that has elapsed, the greater the potential for substantial investment and other commitment in reliance on agency approvals. In addition, the public (and especially parties that have expressed their interest through participation in the project) certainly have notice of an agency's final decision in ample time to bring a prompt challenge.[24] Thus, no legitimate policy is promoted by a delay in litigation. Imposing a shorter time period imposes little risk that a potential plaintiff was taken completely unawares. We recommend a general limit of 180 days.[25] In addition,

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[21] 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). *See, e.g., Jersey Heights Neighborhood Ass'n v. Glendening,* 174 F.3d 180, 186 (4th Cir. 1999); *Southwest Williamson County Community Ass'n v. Slater,* 173 F.3d 1033, 1036-37 (6th Cir. 1999); *Chemical Weapons Working Group, Inc. v. Dep't of the Army,* 111 F.3d 1485, 1494-95 (10th Cir. 1997).

[22] *See, e.g., Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987) ("NEPA itself does not contain a statute of limitations" therefore timeliness challenges involve only the doctrine of laches); Daniel R. Mandelker, NEPA Law and Litigation § 4:34 (opining that *Park County* takes the better view). Because laches is an ad hoc doctrine that is determined on a case-by-case basis by individual courts, it provides little predictability to parties seeking finality in agency decisionmaking. Nor does it provide clear advance guidance to plaintiffs who may be considering whether and when to raise their claims.

[23] *See, e.g., Southwest Williamson County,* 173 F.3d at 1036.

[24] *See, e.g.,* 40 C.F.R. § 1505.2 (public record of decision where EIS is prepared); 40 C.F.R. § 1506.6 (public notice and involvement requirements).

[25] For other administrative review, environmental statutes have traditionally required challenges during a more restricted period. For example, the Clean Water Act required review of most administrative regulatory decisions within 120 days. *See* Clean Water Act § 509(b), 33 U.S.C. § 1369(b). *See also* Clean Air Act § 307(b), 42 U.S.C. § 7607(b) (generally requiring an action

if another statute prescribes a shorter duration, we recommend that NEPA be amended to explicitly yield to any shorter period of time prescribed for bringing an action.

D. Provide For Responsibility for Attorneys' Fees.

Under the "American Rule" governing attorneys' fees, parties generally bear their legal expenses, regardless of the result of the litigation. In addition to facing the costs associated with additional environmental analyses, the government and project proponents consequently often incur significant legal fees while responding to a NEPA challenge. There is one exception to this rule that applies to NEPA: the Equal Access to Justice Act[26] ("EAJA") allows federal courts to award costs and fees to a prevailing party in a NEPA action against the government, provided that the government's position is not substantially justified. Many cases have allowed successful public interest parties to recover their fees when there is a material alteration or a court-ordered change in the legal relationship between the parties.[27]

There is currently no opportunity, however, for project proponents to recover their costs and fees from private parties who initiate frivolous NEPA litigation. The Task Force should consider conferring authority upon the district courts to award attorneys' fees incurred by the government and industry in defending unfounded NEPA litigation. If, for example, NEPA prescribed that the district court may exercise its discretion to award attorneys' fees against any party challenging a federal project on NEPA grounds in those circumstances, the provision might well limit the number of frivolous challenges. Such a provision would not, however, chill or inhibit plaintiffs' ability to bring meritorious NEPA actions, since it would be limited to the most egregious of cases.

III. PERMIT INCREASED PARTICIPATION IN LITIGATION BY PROJECT PROPONENTS AND OTHER INTERESTED PARTIES.

A. Change the Intervention Standards for Project Proponents.

Although most federal courts follow a liberal policy in allowing citizen groups and environmental associations to defend the general public's broad interest in environmental protection, some courts have been far less willing to allow private parties to defend an agency's

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challenging administrative decisions to be brought within sixty days). This period also coincides with the limitation imposed by Section 6002(l)(1) of the recently passed Transportation Act.

[26] 28 U.S.C. § 2412(b)(d).

[27] *See Preservation Coalition of Erie County v. Fed'l Transit Admin.,* 356 F.3d 444, 452 (2d Cir. 2004) (examples include enforceable judgments, consent decrees, court order to prepare a supplemental EIS).

position on the grounds that those parties have economic interests.[28] Project proponents typically have a direct and significant interest in the property or transaction that is the subject of a lawsuit brought under NEPA, yet face hurdles in participating in the litigation. Specifically, it has proven difficult for some parties to intervene "as of right" in the litigation because some courts have held that the government is the only proper defendant in a NEPA challenge. To remedy this fundamental unfairness, we recommend amending NEPA to expressly protect the rights of prospective intervenors who have a significant economic interest in the outcome of NEPA claims.

NEPA itself does not contain a provision addressing intervention by private parties. Rather, federal courts rely on the Federal Rules of Civil Procedure to decide whether a party can intervene in a lawsuit raising NEPA challenges. Recently, federal courts, particularly in the Ninth Circuit, have applied Rule 24(a) in such a way as to close the courts to private parties who are directly affected by the outcome of the cases in question.[29] According to Ninth Circuit precedent, NEPA does not provide protection for purely economic interests.[30] Courts in the Ninth Circuit have held that parties with purely economic interests do not have a "significantly protectable interest" in NEPA litigation and cannot intervene as of right under Rule 24.[31]

The Ninth Circuit's interpretation can have unfair consequences in the context of NEPA. If a court concludes that only the government has the requisite interest in NEPA cases, project

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[28] *Compare Wilderness Soc. v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (concluding that D.C. Circuit's generous attitude toward Rule 24(a) in general should carry over to NEPA context) *with Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000) (denying intervention on the merits to project proponents).

[29] According to the Ninth Circuit, a party may intervene under Rule 24(a) provided the party satisfies four necessary factors: (1) motions for intervention must be timely; (2) the nonparty must claim a "significantly protectable interest" relating to the subject matter of the action; (3) the nonparty must demonstrate that his ability to protect his interest will be "impair[ed] or impede[d] by a negative result in the action; and (4) the nonparty must demonstrate that his interests are "inadequately represented" by the existing parties." *See, e.g., Sierra Club v. United States E.P.A.*, 995 F.2d 1478, 1481 (9th Cir. 1993). Applying this test, the Ninth Circuit has repeatedly ruled that industry parties cannot intervene as of right in NEPA cases because only the government is a proper defendant. *See, e.g., Churchill County v. Babbitt,* 150 F.3d 1072, 1082 (9th Cir. 1998). The Ninth Circuit's "government-only" ruling stems from an interpretation of the "significantly protectable interest" test that excludes economic interests. *See Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1108 (9th Cir. 2002). The court has reasoned that NEPA requires action only by the government, and therefore only the government can be liable. *Churchill County v. Babbitt,* 150 F.3d at 1082.

[30] *Portland Audubon Soc. v. Hodel*, 886 F.2d 302, 309 (9th Cir. 1989).

[31] *Id. But see Rosebud Sioux Tribe v. McDivit*, 286 F.3d 1031, 1038 (8th Cir. 2002) (citing *Bennett v. Spear*, 520 U.S. 154, 166 (1997)); *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125 (8th Cir. 1999).

proponents can be barred from litigation despite the fact that their interests would be severely jeopardized by an adverse ruling and would not be adequately represented by the government defendant. Because the Ninth Circuit is the largest federal circuit—including California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, and Hawaii — the effect of this troubling jurisprudence is wide-reaching. Other courts and commentators have been critical of the Ninth Circuit's position.[32] NEPA legislative amendments should clarify that parties who have made substantial economic investments in a project have a "significantly protectable interest" under NEPA.

B. Permit Participation by Project Proponents and Other Interested Industry Representatives in Government Settlement Negotiations.

When a government agency decides to participate in settlement discussions with NGOs and other NEPA plaintiffs, affected businesses can be excluded. In keeping with the recommendation above that industry be full-fledged participations in the litigation, industry should also be an important part of any settlement. NEPA amendments should require settlement negotiations to include project proponents and other affected businesses.

IV. GIVE COURTS MORE GUIDANCE.

A. Establish a Standard of Review within the NEPA Statute.

The standard of review governing NEPA is that for informal decision-making and is borrowed from the Administrative Procedure Act (APA).[33] Judicial review determines whether an agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[34] Obviously, the standard of judicial review a court selects determines its likelihood of overruling an agency's decision. This "arbitrary and capricious" standard is the most deferential standard courts apply when reviewing agency decisions.[35] In NEPA cases, courts generally apply the APA's arbitrary and capricious standard to an agency's decision on whether an EIS is required or whether an action is categorically excluded. Courts differ, however, in how they apply that

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[32] *See, e.g., The Wilderness Society v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (noting Ninth Circuit's jurisprudence on intervention is NEPA cases is "unduly rigid in light of Rule 24's purpose of protecting third parties affected by litigation" and instead allowing prospective intervenors to participate in all aspects of litigation).

[33] *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1989).

[34] 5 U.S.C. § 706(2)(A).

[35] *See, e.g.,* Mandelker, NEPA Law and Litigation § 8:2.

standard.[36] For example, some courts conclude that because NEPA is not the province of any particular agency, no one agency has "expertise" with respect to that statute and agencies are therefore due less deference in NEPA cases than in other administrative law contexts. In other cases, courts have found that a "reasonableness" standard applies to the threshold legal question of whether an action is a "major federal action" under NEPA.[37]

In order to ensure that agencies' NEPA decision-making receive all the deference they are due, the statute should include an explicit standard of review for NEPA cases.

B. Clarify Remedies When a NEPA Violation is Found.

Currently, some case law may be read to suggest that once a court finds a violation of NEPA, it must halt the entire project. Yet, in many instances, courts are able to tailor an injunction to protect the environmental interest at issue during the pendency of the preparation of an EIS. The authority to issue an injunction of this sort should be codified and encouraged.

[36] *Id.* at § 8:7.

[37] *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283 (8th Cir. 1990). *Compare, e.g., Spiller v. White,* 352 F.3d 235, 240 (5th Cir. 2003) (plaintiffs face "high bar to success" since decision not to prepare EIS is "accorded a considerable degree of deference") *with Grand Canyon Trust v. FAA,* 290 F.2d 339, 340-41 (D.C. Cir. 2003) (stating agency's EA must take "hard look at the environmental concern, must make convincing case for FONSI, and agency must ensure projects has sufficient safeguards to reduce impacts to minimum when EIS not prepared).

CONCLUSION

Thank you for the opportunity to testify here today. My clients and I appreciate the Task Force's efforts in providing this series of public hearings as a forum for those interested in improving NEPA. The recommendations I have made here seek to address some of the more critical flaws in the current NEPA regulatory scheme. Each of these issues – as well as many others -- merit investigation and discussion in a level of detail not appropriate for today's hearings. We look forward to working with you, and others in Congress, to listen to other concerns, to analyze fully the effects of the current system and to develop a reasoned, responsible approach to NEPA reform.